APPENDIX A

October 14, 2009 Supreme Court of Ohio Denial of Cert

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

APPENDIX B

SEAN C. GALLAGHER, P.J.:

Appellant, Ivan Kuhar, appeals the trial court's dismissal of his action against Marc Glassman, Inc. ("Marc's"), with prejudice pursuant to Civil Rule 12(B)(6). Kuhar asserts the dismissal should have been without prejudice, allowing him the opportunity to refile the action. For the reasons outlined below, we affirm the trial court's dismissal of the action with prejudice.

One June 5, 2006, Kuhar was apprehended by Marc's store personnel after shoplifting at the Marc's store in Euclid, Ohio. In his single-count complaint filed on June 5, 2009, Kuhar alleged that he was "physically attacked and abused by agents or employees of Marc's in connection with a shoplifting matter, said behavior being unreasonable and negligent in fashion." In effect, Kuhar raised a claim of assault and battery against Marc's.

Marc's filed a motion to dismiss on July 1, 2008, on the basis that the one-year statute of limitations for assault and battery actions had lapsed before the filing of the claim. Kuhar failed to respond to this motion, and the trial court dismissed the action with prejudice pursuant to Civ. R. 12(B)(6) on July 23, 2008. Kuhar now appeals, raising one assigned error.

"Appellant contents the Trial Court committed error in dismissing Plaintiff's case *With Prejudice* after Plaintiff missed the Court's filing deadline in response to a 12(B)(6) Motion to Dismiss. It should have been dismissed *Without Prejudice* which would have allowed a refilling of this action."

In his assigned error, Kuhar contends the trial court should have dismissed the action with prejudice, allowing him to refile the action. He asserts his failure to respond to motion to dismiss filed by Marc's should not result in a dismissal with prejudice.

Marc's argues that the complaint was properly dismissed with prejudice because the statute of limitations had run.

An appellate court reviews a Civ.R. 12(B)(6) motion to dismiss de novo. *Hughes v. Miller*, Cuyahoga App. No. 91482, 2009-Ohio-963. A motion to dismiss for failure to statue claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. Id. Under the de novo analysis, an appellate court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. Id.

When the essential character of the alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery applies, even if the touching is pled as an act of negligence. *Salen v. Marc Glassman, Inc.,* Cuyahoga App. No. 86010, 2005-Ohio-6127, citing *Love v. Port Clinton (*1988), 37 Ohio St.3d 98. To hold otherwise would defeat the assault and battery

statute of limitations, because nearly all assault and battery claims can be pled as negligence claims. Id. One cannot circumvent the statute of limitations for assault and battery through clever pleading or by utilizing another theory of law.

Even accepting Kuhar's claims alleged in the complaint as true, it is inescapable that the cause of action raised in Kuhar's complaint is assault and battery. The statute of limitations for an intentional tort, such as assault and batter, is one year. R.C. 2305.111. *Walker v. Bunch*, 7th Dist. No. 05-MA-144, 2006-Ohio-4680. While Kuhar references the term "negligence" in the complaint, the factual allegations are the Kuhar was "physically attached and abused." There was no separate claim of negligence raised regarding the hiring, supervision, or retention of the Marc's workers.

A Civ.R. 12(B)(6) motion for failure to state a claim based on an expired statute of limitations may be granted when the

complaint shows on its face the bar of the statute. *Mackey v. Luskin,* Cuyahoga App. No. 88874, 2007-Ohio-5844. Here, the complaint alleged that the incident happened on June 5, 2006. The complaint was filed on June 5, 2008, one year after the statute of limitations expired.

Further, a dismissal for failure to commence an action within the applicable statute of limitations is a dismissal on the merits of the case; therefore, a dismissal with prejudice is appropriate. *Lewis v. Hayes,* Franklin App. No. 08AP-574, 2009-Ohio-640; citing *LaBarbera v. Batsch*, (1967), 10 Ohio St.2d 106.

Here, it would have made little difference if the trial court dismissed the action without prejudice. Even a refiling would have been subjected to the same review under the one-year statute of limitations. Kuhar's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellate recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

APPENDIX C

July 23, 2008 Trial Court Opinion (CUY.CO.OH)

Defendant Marc Glassman Inc.'s Motion to Dismiss, Filed 07/01/2008, is unopposed and granted. Plaintiff's case is hereby dismissed with prejudice pursuant to Civil Rule 12(B)(6) for failure to state a claim upon which relief can be granted. Final. Court Cost Assessed to the Plaintiff.